UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Jam Productions, Ltd., Event Productions, Inc., Standing Room Only, Inc. and Victoria Operating Co., a single employer, Employer, and Theatrical Stage Employees Union, Local 2, I.A.T.S.E., Petitioner.	Case No. 13-RC-160240

PETITIONER'S BRIEF ON REVIEW

The Board must affirm the Regional Director's Supplemental Decision and Certification of Representative in this case, as the Regional Director properly found that the evidence failed to establish that the Union engaged in objectionable conduct that could have influenced the May 16, 2016, election. Rather, the evidence instead showed that the twenty of the forty-three eligible Jam voters who signed up to participate in the Union's referral system, seeking work opportunities after Jam fired them from the Riviera Theatre, participated in the referral program on the same terms as everyone else, receiving no special treatment, and receiving the same referrals they could and would have received in the absence of the pending election. Because the Regional Director properly interpreted the evidence and properly applied the law, his decision must be upheld by the Board.

Jam's request for review, granted by the Board, raises an exhaustive litany of issues, challenging the Regional Director's decision in nearly every conceivable respect. The Union attempted to comprehensively counter this catalog of criticisms in its response to Jam's request for review, and rather than rehashing its prior filing, the Union instead

incorporates that document herein by reference, focusing in this short brief on Jam's contention that this case presents questions not addressed by existing Board precedent. The Board should reject that contention, because this case falls squarely within the Board's existing precedents, which the Regional Director correctly applied.

I. The Regional Director's fact-finding must be affirmed.

Before turning to the applicability of existing precedent, the Union reiterates simply that the Regional Director's fact-finding is subject to review under a "clear error" standard. Board's Rules & Regs. § 102.67(d)(2). Former Chairman Miscimarra has described the burden of demonstrating the Regional Director's clear error as "considerable." *Wolf Creek Nuclear Operating Corp.*, 364 NLRB No. 111, slip op. at 5 (2016). Under the clear error standard, the reviewing body "may not reverse just because [it] 'would have decided the [matter] differently.' A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern." *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017), quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985). "Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Carpet Serv. Int'l, Inc. v. Chicago Reg'l Council of Carpenters*, 698 F.3d 394, 397 (7th Cir. 2012). Almost all of Jam's arguments in its request for review urged the Board to reverse particular factual findings of the Regional Director under this standard. While the Board may or may not come away from a review of the evidence with a different overall impression of what it shows, there is no gainsaying that his findings are a permissible view of the evidence and plausible in light of the full record, for all of the reasons discussed at length in the Union's response to Jam's request for review and its briefing to the Regional Director. The Board should not disturb those findings.

II. The Regional Director properly applied existing precedent to the facts of this case.

Jam closes its request for review with an assertion that there are no Board precedents addressing a "discretionary referral system, without safeguards, [used] to engage in inherently coercive conduct (i.e., referral of high-paying union jobs to voters) during the critical period." (Req. for Rev. at 47.) Jam's conclusion is that the Union "must have been motivated, at least in part, by a desire to influence the voters when they referred them for work," but, essentially acknowledging that the evidence does not show this, pleads to the Board that it should find that offering "discretionary referrals" to Jam voters was *per se* coercive as a matter of law. (Req. for Rev. at 49.) This demand not only misstates the predicate facts; it calls for an unnecessary and imprudent change to existing law. The Board must reject Jam's invitation to view this case as anything remarkable lying outside the well-defined bounds of its existing and long-established precedents, precedents that fully support the conclusions reached by the Regional Director on the basis of the evidence presented at hearing.

A. This case falls within the existing precedential framework.

Jam's statement that there are no precedents dealing with the facts presented by the this case, at one level, is obviously true: the Union, too, has unearthed no prior cases in which an employer fired its entire complement of employees at a workplace simultaneously with the filing of an RC petition, which employees then sought to replace their lost income by seeking work with signatory employers through a union's referral program, which then experienced an extraordinary demand for referred employees in the weeks prior to the election, resulting in more work opportunities than usual for that time of year.

But the nature of adjudication under a system of precedents, of course, is that the precedents announce general rules that adjudicators apply to the facts of individual cases. The present case is no different.

In this case, what the long-standing precedents establish is that, just like an employer, a petitioning labor organization may not try to buy votes by giving voters something of value during the critical period; just like when an employer does it, granting benefits that voters would not have received but for their status as voters in the pending election is presumed to inappropriately influence or create a sense of obligation in the voter. *Owens-Illinois, Inc.*, 271 NLRB 1235 (1984). Conversely, benefits that voters would have received anyway in the absence of the pending election, regardless of their status as voters, are not an objectionable inducement; it is not "vote buying" to give voters something they would have received anyway. *In Re Onan Corp.*, 338 NLRB 913 (2003) (finding that employer's announcement of settlement of pension litigation was not objectionable where such announcement was consistent with prior practice of announcing developments in the litigation).

The putative "benefit" that Jam assails here was the opportunity to be referred to work opportunities with signatory employers. But for a work referral to be a conferral by the Union of a thing of value on a voter, the Union has to be making opportunities available to the Jam voters that they would not have enjoyed but for their status as eligible voters. That is, the Union cannot be *giving* voters something of value as an inducement unless they would not otherwise have received it.

When I go to the bank to make a withdrawal, the bank is "giving" me money only in the sense of handing it to me; that act is not a gift because the money was already mine.

When I arrive at a polling place where I am registered to vote, I am "given" an opportunity to vote in the sense that I could not vote absent the poll workers handing me a ballot and granting me access to the polling place, but I do not feel indebted to the poll workers, as they just gave me what I was entitled to receive. The circumstances of the present case are no different.

Contrary to Jam, the role of discretion in the referral system changes nothing in the analysis. Jam contends that the call steward's discretion as to which individual he will slot into which work opportunity with which employer, no participant can say that they were "entitled" to any *particular* job. I can never complain under the Union's system that slot number forty-seven on the call at the United Center on Thursday was rightfully mine, and I was wronged when someone else worked it. But regardless of whether a voter was "entitled" to a *particular* work referral, if the Union offers voters referrals that they would and could have received regardless of their voter status, they have not been given an inducement of any kind.

The Board's cases do not generally frame their analysis in terms of whether voters received a benefit despite lacking an "entitlement" to it, but rather in terms of whether voters received something they would not have received if they were not voters. In its cases involving a labor organization bestowing a benefit on eligible voters, the Board has found that the union acts objectionably when it makes a benefit available to voters who, but for the exception the union has made, would not otherwise have received it.

For example, when a union decided to waive back dues owed by members of the bargaining unit in a decertification election, it treated them differently than they otherwise could or would have been treated. But for the union's waiver decision, the members

would, as they had up until that decision was made on the eve of the election, still have owed the money and faced the consequences of their debt, like any other member that owed the union money. *Go Ahead N. Am., Inc.*, 357 NLRB 77, 78 (2011). Where ordinarily only members were eligible to receive a life insurance policy, the union acted objectionably when it instead made the policy available to voters who were not yet members; the Board does not say, nor was it necessary to say, that members were legally *entitled* to receive the policies. *Wagner Elec. Corp.*, 167 NLRB 532, 533 (1967). And when a union brought two vans to the employer's premises two days before the election to do free health screenings that it ordinarily provided only to employees in bargaining units it already represents, it lowered a barrier to access to that benefit solely on the basis of the individuals' status as voters. *Mailing Servs., Inc.*, 293 NLRB 565 (1989). The Board expressly noted that the record did not reflect whether the tests were provided to all represented employees regardless of membership, or were otherwise made available to union members generally, (*Id.* at 565 n.1); it is not that technical "entitlement" to the benefit that matters, but the fact of granting access that could not otherwise have been had by the voters. Finally, when a union lowered an existing barrier to access to mechanics' cards for a group of voters by eliminating the requirement that they complete coursework and pass exams, it acted objectionably. *NLRB v. River City Elevator, Inc.*, 289 F.3d 1029, 1033 (7th Cir. 2002).

The courts have viewed the cases similarly. For example, where referrals to other signatory contractors through a joint apprenticeship training committee were ordinarily available only to existing employees of signatory contractors, the union acted objectionably when it made those referrals available and let the voters participate. *King Elec., Inc. v.*

NLRB, 440 F.3d 471, 475-76 (D.C. Cir. 2006). It does not matter whether access to the referrals was a right or "entitlement" for those who ordinarily received them; the objectionable conduct came in granting the voters access they otherwise would not have had. By contrast, where a union's normal practice was to issue apprentice cards to the employer's employees after one year of service, issuing them to voters in a representation proceeding who met that criterion did not represent different treatment because of their status as voters. *NLRB v. Chicago Tribune Co.*, 943 F.3d 791, 797 (7th Cir. 1991). Whether the employees had any legal "entitlement" to the cards or not, the conduct was not objectionable because the union just treated the voters according to its usual practice, effecting "no change in the status quo." *Id.*

Jam points to an ostensible added layer of complexity in the present case: the alleged "benefit" in this case was not a jacket, or a one-time act of forgiving back dues, but rather participation in the Local's referral system, which in this case meant varying patterns for the different voters of working some days and some jobs but not others over a period of time in a referral system with an element of discretion as to who receives which referral. But that added complexity is a red herring. The question remains merely whether the Jam voters were treated differently because they were Jam voters, or instead received the referrals they would have received regardless of the pending election. The Regional Director found that the voters participated in the referral program on the same terms and to the same extent as they otherwise would have, and on the same terms and to the same extent as anyone else. His finding was not clearly erroneous.

Jam's argument is that this case is categorically different because of the element of discretion in filling specific slots in specific calls with specific individuals, which supposedly makes it impossible to prove *for any given referral* that a Jam voter would have gotten that referral anyway but for the pending election. But Jam is missing the forest for the trees. It is only when one focuses with excessive granularity, day by day, job by job, that the evidentiary task can be made out to seem impossible. It is *entirely possible* to look at referrals over a period of time and see whether the Jam voters were treated consistently with their peers.

Imagine a high school baseball coach whose son is on his team. The team is a "no cut" team—anyone who signs up can join. In setting his lineups, the coach takes a variety of factors into account, including skill, injuries, matchups, and so forth. He has no precise, mathematical formula for doing so; on the contrary, he has total discretion. Yet, the lineups follow a pattern. Most players have assigned positions, and in most games the same person bats leadoff. The best players play almost every game. The least skilled almost always ride the bench. And others will play some but not all games. No one is "entitled" to their spot; it is up to the coach every game whom he will play. If the coach is accused of favoring his son, we can simply look at how his son is actually treated over the season. If he is assigned to play first base and bat cleanup every single game despite being a mediocre talent, that supports the accusations against the coach. But if he is playing about the same as all of the other mediocre talents, then there is no evidence of preferential treatment. When he does play, he is not "receiving" anything from the coach that he would not have gotten if he were not family. If the coach explains to us his process for putting his lineups together, and if he tells us that he follows that process with respect to

his son, treating him no differently than anyone else on the team, then the fact that, on one particular day out of the whole season, his son batted sixth instead of seventh or played while a teammate was on the bench tells us nothing. But if the larger, overall picture shows that his son played about the same as other players of similar ability, that supports the coach's claims of innocence, and the *son* will have no sense that he is being given special treatment.

The present case is no different. The Regional Director's finding was that the pattern of referrals was consistent as a whole with the approach and principles described by the Union, and these factual findings cannot be said to be "clearly erroneous." As the Union has argued at length, both to the Regional Director and to the Board in response to Jam's request for review, the Union's officers—called by Jam as their witnesses—testified without contradiction that anyone is free to sign up to receive referrals, testified without contradiction about the factors they consider in filling calls on request from employers, and testified without contradiction that they followed those procedures in referring the Jam voters to job opportunities when they signed up for referrals, as they had every right to do (and every need to do after Jam fired them). The Regional Director, weighing this evidence, found that it demonstrated that the Jam voters were treated no differently than anyone else similarly situated, and thus no differently than they would have been absent the pending election. Finally, and as the Union has also already argued at length, the fact that the number of referrals increased in the period before the election is not evidence of vote-buying when viewed in the context of the significant increase in available work during that period. To revert to the baseball analogy, any player is likely to have more starts in a month in which there are more games on the schedule.

In short, it is entirely possible to examine the referral data to see whether the Jam voters were treated the same as everyone else. The Regional Director did precisely that and found the data consistent with the Union officers' testimony that the Jam voters merely participated in the referral program in the ordinary course of its operations, on the same terms as any other participant. Those findings were not clearly erroneous.

B. The Regional Director properly applied the burden of proof.

While the Union has argued, and still maintains, that proving objectionable conduct in this case remains Jam's "heavy" burden, *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005), some of the Board's precedents involving employer grants of benefits hold that a benefit granted in the critical period is *presumptively* coercive and shifts the burden to the employer to demonstrate circumstances that render it non-coercive; most commonly this means proving that the benefit would have been provided regardless of the pending election. *Comcast Cablevision of Philadelphia, L.P.*, 313 NLRB 220, 248 (1993). The Union still maintains that the Regional Director correctly found that alleged benefit in this case of access to work opportunities through the Union's referral program was not a "benefit" that was "granted" to the Jam voters, because anyone may sign up to participate in the referral program, and the Jam voters received referrals under exactly the same terms as any other participant. (Suppl. Dec. at 4.) But even if one concludes that the work opportunities that some Jam voters received were a "benefit" and adopts the burden-shifting framework, the evidence satisfies the Union's burden of proof.

In the context of employer-granted benefits, if the benefits were granted as part of an established policy from which the company did not deviate, then they are not unlawful. *Pacific Coast M.S. Indus. Co., Ltd.*, 355 NLRB 1422, 1433 (2010).

> In cases involving company or system-wide adjustments in benefits, these principles apply regardless of whether the adjustments are part of a regular pattern or, as in this case, are made on a one-time basis. If the employer would have granted the benefits because of economic circumstances unrelated to union organization, the grant of those benefits would not have violated the Act.

Woodcrest Health Care Ctr., 366 NLRB No. 70, slip op. at 5 (2018). Indeed, "[t]he Board has held that during a union organizing campaign, employers must act as they would in the absence of a union campaign." *In Re Onan Corp.*, 338 NLRB 913 (2003) (finding that employer's announcement of settlement of pension litigation was not objectionable where such announcement was consistent with prior practice of announcing developments in the litigation). The Employer must grant or withhold benefits "precisely as it would if the union were not on the scene." *R. Dakin & Co.*, 284 NLRB 98 (1987).

Exactly the same logic applies in the present case. If benefits granted by an employer are not objectionable when the employer demonstrates that they were granted in the ordinary course of the status quo, just as they would have been absent the pending union election, the same is true of benefits conferred by a labor organization. And in the present case, as discussed above and already argued at length, it was not clear error for the Regional Director to find that the participation of twenty of the forty-three eligible Jam voters in the Union's referral program occurred "in accordance with the normal operation of the hiring hall to jobs [to] which they were entitled." (Suppl. Dec. at 7.) This finding establishes that the Union met its claimed burden of proving that it made referrals pursuant to established policy and without regard to the pending election, and that the Jam voters' referrals were not objectionable.

C. Nothing in the circumstances of this case require a new or different standard.

Because, as set forth above, this case may be easily analyzed under the existing framework provided by the Board's existing precedents, there is no cause for a sweeping new standard that the referrals in the present case were "inherently coercive as a matter of law" just because the call steward's day-to-day decision-making involved the exercise of discretion. Under the new standard that Jam urges, the Union would have to affirmatively bar the Jam voters—including those who were already signed up with the referral program—from receiving referrals once the petition was filed, even though this would depart markedly from its existing method of operation. In no other context involving either unions or employers is the party granting critical-period benefits denied the opportunity to demonstrate that the voters would have received those benefits anyway, and thus that no reasonable person would view them as an enticement or inducement or form of coercion, any more than I could reasonably think the bank was doing me a special favor by giving me my money when I requested a withdrawal. Jam has expressed no policy reason for treating the Union so differently in this case; its argument is entirely that the difficulties of proof make it necessary. But as argued above, there are no such difficulties; the evidence supported the Regional Director's findings that, over the course of the critical period, the Jam voters participated in the referral program on the same terms as everyone else, receiving no special treatment. Those findings are not clearly erroneous, and the Regional Director applied the proper legal standard to them. His decision must be affirmed.

CONCLUSION

The Board remanded this case to the Regional Director to hold a hearing to determine "whether the Petitioner increased the number of job referrals to the 21 voters in the former Riviera crew during the last six weeks of the critical period and, if so, whether such referrals constituted an improper 'inducement' to win employees' support in the representation election." (Board's Order at 2.) On remand, Jam presented evidence on, and the parties briefed, and the Regional Director decided, a wide range of factual issues relating to the referral of eligible voters. What all of that evidence ultimately showed was that, while the eligible Jam voters who participated in the referral program did receive more referrals during the last six weeks of the critical period than they had in previous weeks (albeit with a sharp drop-off in the week before the election, when the NFL Draft left town), it is nonetheless not exactly correct to say that "the Petitioner increased the number of job referrals to the 21 voters." There was a significant increase in the amount of work that the Union needed to fill during that period, and as a result the Jam voters had more work opportunities. But there was no evidence that the Union acted deliberately to increase the work that the Jam voters received, or that it gave them any work because they were Jam voters. Because the Union merely preserved the status quo, giving the Jam voters the same work opportunities they could and would have received in the absence of the pending election, the referrals they received were by definition not an improper "inducement" to win their support during the election. For all these reasons, the Regional Director's Supplemental Decision and Certification of Representative must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David Huffman-Gottschling, an attorney, certify that I caused a copy of the foregoing document to be served upon the following persons by email pursuant to Sections 102.67(i)(2) and 102.114(a) of the Board's Rules and Regulations on May 8, 2020:

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